IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ... 77-1775

CARL A. MORSE, INC. (Diesel Construction, a division), individually and on behalf of trust beneficiaries of funds accruing for the construction of an improvement of real property at Tax Block 3605, Lot 1, Queens, New York,

Plaintiff-Appellee,

against

RENTAR INDUSTRIAL DEVELOPMENT CORP., RENTAR INDUSTRIAL DEVELOPMENT ASSOCIATES, VERTICAL INDUSTRIAL PARK ASSOCIATES, ARTHUR RATNER, DENNIS RATNER AND MARVIN RATNER,

Defendants-Appellants,

and

THE CITY OF NEW YORK, ROBERT HALL METROPLEX CENTER CORP., R. H. MACY & CO., INC., STONE SUPPLY CO., INC., BLACKMAN-SHAPIRO CO., INC., A TO Z EQUIPMENT CORP., GLOBE PIPE & FITTING CO., INC., ABCO INDUSTRIAL SUPPLY CORP., CARPENTER AND PATERSON OF NEW YORK, INC., NEILL SUPPLY CO., INC., BALTIMORE AIRCOOL COMPANY, a subsidiary of MERCK & COMPANY, INC., MATERIAL STRENGTH, INC., ALBERT SAGGESE, INC., RAC MECHANICAL, INC., SAL PICONE & SONS, INC., ALBERT PIPE SUPPLY CO., INC., MUNRO WATERPROOFING, INC., HANLEY COMPANY INCORPORATED, JOEL J. CHAIT PLUMBING & HEATING CORP., J. C. EXCAVATION CORP., TRIPLE M. ROOFING CORP., REUTHER MATERIAL CO., PETROLEUM FOR CONTRACTORS, INC., NATIONAL LIGHTING SUPPLY CO., INC., KELLEY COMPANY, INC., FLOCKHART FOUNDRY COMPANY, STYRO SALES COMPANY, INC., CONTRACTORS SUPPLY CORP., MASON MIX, INC., ADVANCED AIR CONTROL CORP., LIGHTING ASSOCIATES, INC., STANTON SAMSON CORP., WORTH SUPPLY CO., INC., ROBERT E. LEVIEN, PRINCE CARPENTRY, INC., LITEMORE ELECTRIC CO., INC. and SCHECTMAN CARPENTRY, INC., ARGONAUT INSURANCE COMPANY, BILLEN AIR CONDITIONING, INC. and REVO MECHANICAL INC.,

Defendants.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE COURT OF APPEALS, STATE OF NEW YORK

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Defendants.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE COURT OF APPEALS, STATE OF NEW YORK

Appellants Rentar Industrial Development Corp., Rentar Industrial Development Associates, Vertical Industrial Park Associates, Arthur Ratner, Dennis Ratner and

Marvin Ratner appeal from the order and judgment of the Court of Appeals, State of New York, dated March 21, 1978, affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated January 24, 1978, which affirmed the order of the Supreme Court of the State of New York, Queens County, dated February 6, 1976, denying appellants' motion for partial summary judgment to declare invalid four mechanics' liens totalling $1,009,983.66, placed by appellee on appellants' property. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinions of the courts below are reported as follows: The opinion of the Court of Appeals, State of New York is reported at 43 N.Y. 2d 952. A copy of the remittitur of the Court of Appeals, State of New York, which contains the Court's opinion and the order and judgment sought to be reviewed, is Appendix A attached hereto.

The opinion of the Appellate Division, Second Department is reported at 56 A.D. 2d 30 and 391 N.Y.S. 2d 425. The opinion of the Supreme Court, Queens County is reported at 85 Misc. 2d 304 and 379 N.Y.S. 2d 994.

Jurisdiction

This proceeding arises out of a motion made at a Special Term of the Supreme Court of the State of New York, Queens County ("Special Term") pursuant to C.P.L.R. 3212(c) (McKinney's 1970) in which appellants sought an order granting them partial summary judgment declaring that four mechanics' liens filed against real property owned by the appellants are invalid as a matter of law. Appellants contended that the liens are invalid as a matter of law because the procedures of the New York Lien Law deprive appellants of their property without due process of law.

Special Term found that the New York Lien Law did *not* meet the standards for the pre-judgment seizure of property as set forth by this Court in interpreting the 14th Amendment to the Constitution. Special Term nonetheless sustained the liens on the ground that the filing of a mechanic's lien did not result in the deprivation of any "significant property interest".

On appeal to the Apellate Division, Second Department ("Appellate Division") the majority of that court affirmed the order of Special Term upholding the constitutionality of the Lien Law. A lengthy dissent concluded that the deprivation of property resulting from the filing of a mechanic's lien was "sufficient to invoke the safeguards of Fourteenth Amendment procedural due process", and "that the statute is fatally defective on due process grounds".

In an order and decision dated March 21, 1978, the Court of Appeals, State of New York ("Court of Appeals") affirmed the order of the Appellate Division on that court's majority opinion. One justice dissented.

The Notice of Appeal to this Court from the decision of the Court of Appeals was filed in the Supreme Court of the State of New York, Queens County on June 13, 1978. A copy of the Notice of Appeal is Appendix B attached hereto.

This is a direct appeal from a final judgment rendered by the highest court of New York State in which the validity of the mechanics' lien provisions of the New York Lien Law was drawn in question on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of the statutes' validity. This

Court has jurisdiction to consider this appeal under Title 28 U.S.C. § 1257(2). *Cohen* v. *California*, 403 U.S. 15 (1972), *reh. den.*, 404 U.S. 876 (1971); *Chicago, B. & O. R. Co.* v. *Chicago*, 166 U.S. 226 (1897).

Statutes Involved

The validity of that portion of Article 2 of the New York Lien Law (McKinney's 1966), pp. 17-239, which relates to the creation and filing of mechanics' liens for private improvements (the "Lien Law"), is involved on this appeal. Those statutes are lengthy and are set forth in Appendix C.

Questions Presented

The questions presented on this appeal are the following:

1. Is the filing of a mechanic's lien a deprivation of property within the meaning of the 14th Amendment to the United States Constitution?

2. Do the mechanic's lien provisions of the New York Lien Law fail to provide due process of law as required by the 14th Amendment to the United States Constitution because of the absence of early judicial supervision and intervention?

Statement of the Case

In this lien foreclosure action, appellee Diesel ("Diesel") seeks, among other things, a judgment declaring the validity of four mechanics' liens filed against the appellants' ("Rentar") property.

On May 15, 1972, Rentar and Diesel entered into a written agreement whereby Diesel, as agent for Rentar, was to supervise the construction of a warehouse building (the "Agreement") called Vertical Industrial Park ("VIP").

Rentar agreed to pay Diesel a fee of $625,000 for its services and to reimburse Diesel for certain expenses. Article 12 of the Agreement provides that "all claims" and "disputes" between the parties were "to be submitted and determined pursuant to the New York Simplified Procedure for Court Determination of Disputes in the Supreme Court of the State of New York, First Judicial District".

Nevertheless, on November 15 and November 21, 1974, Diesel filed four mechanics' liens with the County Clerk of Queens County against Rentar's property. Three of the four liens were for the supervision of construction work for the three tenants in VIP. These were for $9,038.48, $35,161.34 and $265,317.62, respectively. The fourth lien was for the supervision "of construction of building" for Rentar in the sum of $700,446.22. The total of the four liens was $1,009,983.66.

However, on November 5, 1974, about one week prior to the filing of the first lien, Diesel had submitted its statement of account to Rentar in which it claimed that the balance due to it, including the work on behalf of the tenants, was only $503,086.66. On November 27, 1974, i.e., about one week after the filing of the last lien on the property, Diesel submitted a revised statement of account to Rentar indicating that the total amount due to Diesel was $562,078.47. This total also included the amount due from the tenants. On January 15, 1975, i.e., approximately two months after the filing of the last lien, Diesel submitted still another revised statement of account indicating that the total amount due, including tenants' work, was $566,990.08. Thus, just prior to the filing of the first lien, subsequent to the filing of the last lien, and as long as two months after the filing of the last lien, Diesel's total claim against Rentar was for a sum which was approximately one-half million dollars less than the total of the liens.

The filing of the four liens almost destroyed Rentar's ability to enter into a permanent mortgage on the premises.

Since the first mortgage given by the Bowery Savings Bank was required to be a first lien on the premises, Diesel's liens had to be discharged by an undertaking. However, in order to obtain an undertaking from a bonding company, security was required in the form of a letter of credit from the Manufacturers Hanover Bank. Manufacturers, however, insisted that the individual appellants personally guarantee 100% of the letter of credit.

As a consequence, the credit of all of the individual appellants has been pledged to secure an undertaking for a sum in excess of a million dollars, and in addition, out-of-pocket costs for the letter of credit and bonding in excess of $17,000 a year have been sustained.

Diesel commenced this action in April 1975. Rentar counterclaimed for willful exaggeration. In December 1974, Rentar commenced an action against Diesel for breach of contract, seeking damages in the sum of about $6,000,000. Subsequently that action was ordered to be jointly tried with the instant action.

How the Federal Questions Are Presented

The federal questions sought to be reviewed here were first raised by appellants when they made their motion for partial summary judgment. In their notice of motion for partial summary judgment, appellants requested an order granting them

> partial summary judgment as to that portion of the first cause of action wherein the plaintiff seeks a declaration as to the validity of four mechanic's liens filed by it against the subject premises, and severing the action as to the balance of the relief demanded in the complaint, upon the grounds that

> the four mechanic's liens are invalid as a matter of law, . . .

The moving affidavit of Dennis Ratner, sworn to August 14, 1975, which accompanied appellants' notice of motion, stated, in paragraph 3, that appellants

> contend these liens are invalid as a matter of law for two principal reasons: (a) Morse acted as [appellants'] agent when it performed work relevant to the premises on which the mechanics' liens are placed and had no right to avail itself of the status of a valid lienor, and (b) the procedures of the Lien Law are unconstitutional as applied in this case, as their application resulted in a deprivation of our property without due process of law.

Special Term, which decided appellants' motion, dealt extensively and primarily with appellants' constitutional claim. The court analyzed the Lien Law's procedures and concluded that they failed to conform to the due process requirements of the 14th Amendment to the United States Constitution.

However, Special Term stated that the "central question . . . is whether the creation of a mechanic's lien constitutes such a seizure of property as to require the compliance with the standards of due process set forth in the 14th Amendment".

In that court's view, the right to constitutional protection extends solely "to significant property interests". Special Term concluded that "the interest acquired by a mechanic's lien is not such as requires court sanction prior to its filing" and that therefore, the mechanic's lien statute is constitutional as applied.

The Appellate Division, in affirming the order of Special Term which denied appellants' motion for partial summary judgment, also devoted extensive analysis to appellants' contention that the Lien Law is unconstitutional.

The Court noted "appellants' contention that the creation of an interest in real property by the filing of a mechanic's lien, without prior judicial approval, constitutes an unconstitutional deprivation of property without due process of law . . .". It analyzed *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) and *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601 (1975), and compared them with the case at bar. The Court concluded that the filing of the mechanic's lien "does nothing more than to impinge upon the economic interests of the owner . . .". It agreed with Special Term that the filing of a mechanic's lien does "not result in the deprivation of any 'significant property interest'".

Therefore, in the Appellate Division's view, "due process of law in this context does *not* require prior notice or the opportunity to be heard . . .". Despite the fact that, as the Appellate Division noted, "the mechanic's lien here . . . can be invoked upon the *ex parte* application of a single party, without prior notice or the opportunity to be heard, and can . . . be invoked incorrectly, albeit in good faith", it upheld the constitutionality of the Lien Law and affirmed the order denying partial summary judgment.

The Court of Appeals affirmed the Appellate Division's order upholding the constitutionality of the Lien Law on the opinion of the intermediate appellate court. The Court's sole comment was an observation on the dissenting opinion in the Appellate Division which, in the Court of Appeals' view, "confuses the impact of a lien on property which does not dispossess the owner with the line of cases

in the Supreme Court of the United States which involved precisely such dispossession by seizure without preliminary judicial determination". The Court, therefore, sustained the constitutionality of the Lien Law.

The Questions Are Substantial

The issues presented on this appeal involve a statutory remedy—the mechanic's lien—which exists in every state, the District of Columbia and Puerto Rico. See 4 CCH Sec. Trans. Guide ¶¶ 8521-80 (1969); 22 Conn. Stat. Ann. 1149-33 *et seq.* (West 1978).

In nearly every state, including New York, the liens are imposed *ex parte* by the creditor, significantly affect the rights of the property owner, and therefore pose serious problems of procedural due process under recent Supreme Court decisions. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601 (1975).

The due process clause requires a hearing at a meaningful time. *North Georgia Finishing* v. *Di-Chem*, 419 U.S. at 607. In failing to provide either for an immediate hearing following perfection of a lien or for judicial supervision of the filing of a lien, the New York Lien Law and most other lien laws leave the debtor at the mercy of the creditor without providing any additional protection for the interests of the creditor. Plenary consideration by this Court is necessary to determine whether the procedural deficiencies in New York's and other states' lien laws make them unconstitutional in their present form.

None of the lower courts which previously grappled with this case concluded that the Lien Law conformed to the due process requirements of the 14th Amendment to the United States Constitution, although the Appellate Division stated that the statute effects " 'a constitutional

accommodation of the conflicting interests of the [several] parties' ". Each court primarily rested its analysis on the resolution of the preliminary issue which also merits plenary consideration by this Court—whether the filing of a mechanic's lien effects such a taking of property that compliance with the procedural due process requirements of the 14th Amendment is required.

Both the Appellate Division and the Court of Appeals implied that an owner of real property which is liened has no right to the protection of procedural due process since he is not completely dispossessed of his property when the lien is filed. That implication is clearly wrong, since what is required to trigger the requirements of the 14th Amendment is the deprivation of a "significant property interest". See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. at 606, quoting *Fuentes* v. *Shevin*, 407 U.S. at 86; *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971), *Sniadach* v. *Family Finance*, 395 U.S. at 342 (Harlan, J., concurring).

1. Other courts have accepted that less stringent test of impairment of "any significant property interest" as the one applicable, and concluded that the filing of a mechanic's lien does amount to impairment of such a "significant property interest". *Barry Properties, Inc.* v. *Fick Bros. Roofing Company*, 277 Md. 15, 353 A.2d 222, 228-229 (1976); *Roundhouse Const. Corp.* v. *Telesco Masons Supplies Co.*, 168 Conn. 371, 362 A.2d 778, 781 (1975), *vacated*, 423 U.S. 809 (1975), *reaffirmed*, 170 Conn. 155, 365 A.2d 393 (1975), *cert. denied*, 429 U.S. 889 (1976); *Connolly Development, Inc.* v. *Sup. Ct. of Merced Cty.*, 32 Cal.Rptr. 477, 553 P.2d 637, 642-644 (1976). These decisions are therefore in direct conflict with the conclusion reached in this case.

Also in conflict with the opinions in this case are those cases in which prejudgment attachments of realty have been held as denying the owner a significant property interest. *Bay State Harness Horse Racing and Breeding Assn., Inc.* v. *PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973); *Gunter* v. *Merchants Warren National Bank*, 360 F. Supp. 1085, 1090 (D. Maine S. D. 1973); *Idaho First Nat. Bank* v. *Rogers*, 41 U.S.L.W. 2492 (D. C. Idaho 1973).

2. The Appellate Division and Special Term cited *Spielman-Fond, Inc.* v. *Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd w/o opn.*, 417 U.S. 901 (1973), for the proposition that "the filing of a mechanic's lien does not result in the deprivation of any "significant property interest". That case was a summary affirmance by this Court of a three-judge District Court's holding that Arizona's mechanic's lien law, Ariz. Rev. Stat. Ann. §§ 33-981, *et seq.* (1974) is constitutional. The District Court in that case concluded that the imposition of an Arizona mechanic's lien does not deprive an owner of a significant property interest. *Id.* at 999. The court also stated that "liens do nothing more than impinge upon economic interests of the property owner". *Id.*

By well-established principles, *Spielman-Fond* has limited force and is by no means dispositive of the serious constitutional issue herein presented. See *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975), Burger, C.J., concurring; *Mandel* v. *Bradley*, 429 U.S. 813 (1977).

Other courts confronted with constitutional challenges to mechanic's lien statutes have not felt bound to follow the result in *Spielman-Fond*. For example, the Maryland Supreme Court, in holding portions of that state's mechanic's lien law unconstitutional in *Barry Properties*, found that the filing of a mechanic's lien effects a "significant" taking of property and compared the Arizona law upheld in *Spielman-Fond* with the Maryland mechanic's lien law. The Court stated, "the Supreme Court may have thought that the Arizona statute contained enough safeguards to satisfy

due process; since Maryland's mechanic's lien law lacks most of those protections, we have no trouble in concluding that *Spielman-Fond* is not dispositive of the issue before us". 353 A. 2d at 234. The Connecticut Supreme Court also reasoned that the Arizona statute offered more due process protection than its state's statute. *Roundhouse Const. Corp.*, 362 A. 2d at 783.

In short, *Spielman-Fond* did not resolve the issues presented in this case. Plenary consideration is required to resolve those issues.

3. The filing of a mechanic's lien effects a deprivation of property within the meaning of the Fourteenth Amendment. Mechanics' liens differ from the types of creditors' remedies involved in *Fuentes* v. *Shevin; Mitchell* v. *W. T. Grant Co.* and *North Georgia Finishing* v. *Di-Chem* in that they affect real, rather than personal, property and do not affect the owner's possessory interest until foreclosure. Prior to foreclosure, however, the lien affects the owner's ability to dispose of his property at full value and his ability to obtain a mortgage, and may create other serious problems for the owner.

Needless to say, the same standards cannot apply in determining whether real, as opposed to personal, property has been "taken". Real property cannot be concealed or removed. Personalty cannot be seized without an actual physical taking. Therefore, to take advantage of land's unique properties, the recording system was developed. See Powell, The Law of Real Property (1977), ¶ 434. The recording system itself provides a method by which an owner's interest in his real property is diminished as well as providing a record of that shrinking interest. One need not possess another's real property in order to acquire an interest in that real property.

In New York (and other states), when a mechanic's lien is filed, the lienor automatically acquires an interest in the

owner's real property. Jensen on the Mechanics' Lien Law (4th Ed. 1963), § 36 ("Jensen"); *Rapid Fireproof Door Co.* v. *Largo Corp.*, 243 N.Y. 486 (1926). Surely when a lienor acquires an interest in the owner's property, the owner loses a corresponding interest. See *Koehler* v. *Aljon Homes*, 2 Misc. 2d 474, 477 (Sup. Nassau 1956), *mod. on other grds.*, 8 A.D. 2d 852 (2d Dept. 1959).

4. The impact on Rentar of the perfection of Diesel's liens was significant. Diesel acquired an interest in the realty to the extent of the liens, i.e., $1,009,983.66. The value of Rentar's interest was correspondingly diminished by that amount, and Rentar could not have conveyed the property without removing the million dollar lien. Warren's Weed New York Real Property (4th Ed.), Marketability of Title ¶ 1.01, Mechanics' Liens ¶ 1.06; *Stern* v. *Gepo Realty Corp.*, 289 N.Y. 274 (1942); *Matter of Perrin* v. *Stempinski Realty*, 15 A.D. 2d 48, 49 (1st Dept. 1961).

The Appellate Division and other courts have speculated that an owner is protected because such a reduction in value is offset by the value that the labor and materials have contributed to the owners' property. See *Cook* v. *Carlson*, 364 F. Supp. 24, 27 (D.S.D. 1973). However, those courts assumed the validity of the lien claim—both with respect to the claimant's assertion that he is entitled to a lien in the first place, and with respect to the accuracy of the amount claimed. In this case, Rentar asserts that the liens were substantially exaggerated. Rentar had no opportunity to present its view of the extent of the lienor's contribution to the value of its property, and the lienor acquired an interest which the law never intended to sanction. See Lien Law ¶ 39.

Rentar's property is virtually unsaleable because of the liens. The record also shows that Rentar's mortgagee required a letter of credit for 100 percent of the value of the liens plus one year's interest as a condition to granting the mortgage. Rentar's principals were required personally to guarantee 100 percent of the bond—i.e., $1,071,000.

If Rentar had not had the financial ability to bond a million dollar lien, the mortgagee would not have closed the permanent loan. Rentar would not have been able to pay anyone who worked on the job. The job would have stopped and, in likelihood, bankruptcy would have ensued.

Rentar's experience was not unusual nor limited to New York. When a lien is filed there is a "presumption of guilt" against the owner, he cannot obtain permanent mortgage financing or sell his property without paying off or bonding the face amount of the lien, whatever that may be. And, in order to bond, an owner must, like Rentar, put up collateral for 100% of the bond. See Ominsky, *The Mechanic's Lien Filed Despite a No-Lien Stipulation: Methods of Prevention and Removal,* 72 Dick.L.Rev. 223, 228-237 (1968); Stalling, *Mechanic's Lien Laws as they Exist Today,* 4 Federal Home Loan Bank Review 232-234 (1938).

The longer it takes to adjudicate the lien, the longer the collateral—the owner's property—is tied up. In addition, there may be delays in obtaining a bond which could result in a stoppage of payments on the building loan.

The filing of a lien does, as the Appellate Division noted, "impinge upon the economic interests of the owner": it can cripple a job and result in the cessation of payments to the other workers on a job. Without mortgage money, most major construction cannot go forward. Surely due process is required before one's economic interests are "impinged" in this manner. *See* Note, *The Constitutional Validity of Mechanics' Liens Under the Due Process Clause —A Reexamination After Mitchell and North Georgia,* 55 B.U. L. Rev. 263, 271-275 (1975). *Roundhouse Const. Corp.* v. *Telesco Masons Supplies,* 362 A.2d at 784-785; *Barry Properties, Inc.* v. *Fick Bros. Roofing Co.,* 353 A.2d at 228.

5. Property need not be physically seized to be "taken" in the constitutional sense. The right to freely convey and use real property is protected by the Federal Constitution.

In *Buchanan* v. *Warley,* 245 U.S. 60 (1917), this Court stated that:

> The Fourteenth Amendment protects life, liberty and property from invasion by the states without due process of law. Property is more than a mere thing which a person owns. It is elementary that it include the right to acquire, use and *dispose of it. The constitution protects these essential attributes of property.* (emphasis added)

See also *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

The unrestricted use of property has been recognized as an interest or right which may be protected even from temporary deprivation. See *e.g. Seattle Trust Co.* v. *Roberge,* 278 U.S. 116 (1928); *United States* v. *Causby,* 328 U.S. 256 (1946); *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962).

This Court has also reasoned that,

> [P]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has acquired either by agreement or in course of time. *U.S.* v. *Dickinson,* 331 U.S. 745, 748 (1947).

6. Assuming that the filing of a mechanic's lien effects a significant deprivation of property, this Court should also determine whether the procedures of the Lien Law are constitutional.

As Special Term noted, this Court's decisions in *Sniadach* v. *Family Finance Corp. of Bay View; Fuentes* v. *Shevin; Mitchell* v. *W. T. Grant Co.,* and *North Georgia Finishing* v. *Di-Chem,* require that

> For a prejudgment seizure to be valid there must be a factual demonstration by the party seeking the seizure of the nature, extent and validity of his claim to a judicial authority empowered to grant

> or deny the seizure and an opportunity for an expeditious adversary adjudication of the claim either prior to or shortly after the seizure.

Special Term concluded that, "[p]rocedurally, the Lien Law does not meet this standard".

Indeed, the Lien Law makes no provision for a) judicial participation in the taking, and b) an early probable cause hearing. The Lien Law nowhere provides for a judicial determination, either prior to or shortly after the imposition of the lien, as to whether the lien has any valid basis, except where the notice of lien is void on its face (see Lien Law, § 19, subd. [6]). Compare *Mitchell* v. *W. T. Grant Co., North Georgia Finishing* v. *Di-Chem.*

The Lien Law permits any person who performs lienable services on real property and who fits within a class of persons entitled to file liens, to perfect his lien by merely filing a notice with the clerk of the county in which the real property is located. Lien Law § 10. No judicial approval or review of the lien at the time of filing is required. Lien Law § 10. It is not even necessary that the lienor give notice of the lien to the owner of the property which is liened. Lien Law § 10, § 11.

Furthermore, the lienor need serve no evidentiary material to support his right to file the lien. See Lien Law § 9. The notice contains only the most rudimentary information as to the total amount due and the time when the work was performed. It need not be a sworn statement based upon personal knowledge; the notice may be verified by the lienor or his agent and may be verified upon information and belief. Lien Law § 9(7).

The lienor is also not required to post a bond to secure the owner in the event the lien is found to have been improperly placed on the property. Compare *Mitchell* v. *W. T. Grant Co.; North Georgia Finishing* v. *Di-Chem.* Section 19 of the Lien Law prescribes the grounds upon

which a lien may be discharged. These include a voluntary withdrawal of the lien by the lienor [19(1)], a final judgment after trial [19(5)] and the posting of a bond [19(4)], among others. However, only section 19(6) permits summary discharge of a lien and entitles the owner to an immediate hearing. However, that section provides extremely narrow grounds as follows:

> A. It appears from the face of the notice of lien that the lien is invalid by reason of failure to comply with section 9 of the Lien Law, or
>
> B. It appears from the public records that the notice has been filed in accordance with section 10.

Therefore, as long as the face of a notice of lien complies with the law, regardless of whether, in fact, a lienor has no right to file a lien, and as long as a lien has been docketed on property owned by the person liened against, as determined by public records, there exists no procedure for the owner to obtain a swift judicial determination as to the validity of the lien.

It has been consistently held that section 19 provides the exclusive manner in which liens may be discharged. See *Matter of R. R. R. Const. Corp.*, 19 Misc. 2d 920 (Sup. Queens 1959), Jensen, § 301. Where, as here, the lienor has grossly exaggerated the lien, the lien is void (Lien Law, § 39). However, the right to challenge the lien on this ground is always reserved for trial. *Application of Upstate Builders Supply Co.*, 37 A.D. 2d 901 (4th Dept. 1971), *app. dism'd.*, 30 N.Y. 2d 515 (1972).

And even in a case where the owner claims that the lienor is not among those persons entitled to file liens under section 3 of the law, because the defect does not appear on the face of the lien, the owner is not entitled to a speedy determination.

In order to obtain a judicial determination as to the validity of the lien, the owner, confronted with a lien, must

generally take the initiative since the lienor is required to do nothing for a year after filing his notice of lien (Lien Law § 17). The owner may serve a notice requiring that the action be commenced, and his notice must provide that the action be commenced no less than thirty days from the date of the notice (Lien Law § 59). Serving such a notice does not result in an expeditious determination on the merits. It does nothing more than simply invite a plenary trial of the issues. At best, the lienor may be required to serve a summons and complaint, issue must be joined and the case must proceed to trial as required by the New York Civil Practice Law and Rules.

Despite the infirmities in the Lien Law, the Appellate Division stated "that the procedural safeguards incorporated into our present statute . . . [effect] a constitutional accommodation of the conflicting interests of the [several] parties (*Mitchell* v. *W. T. Grant Co.*, 416 U.S. at p. 607, *supra*)."

However, the present New York scheme makes no accommodation for the interest of the owner in being protected from wrongful seizure. The requirement of an early post-perfection hearing would protect the owner because he would have a swift opportunity to challenge and discharge both void and properly placed liens. The lienor, on the other hand, would run no risk that the property will be alienated before the lien can attach. Judicial supervision of the filing of liens would give owners further protection against the filing of void liens without infringing on lienors' interests.

Plenary consideration is required to determine what procedures are required to meet constitutional standards of due process.

CONCLUSION

The decisions below warrant summary reversal. In any event, this Court should note probable jurisdiction and resolve the questions presented with briefs on the merits and oral argument.

Respectfully submitted,

June, 1978

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TENZER, GREENBLATT, FALLON & KAPLAN
MONA D. SHAPIRO
Of Counsel

Appendix A, Order and Judgment of Affirmance.

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

2 No. 82

Carl A. Morse, Inc. (Diesel Construction, a division), &c.,

Respondent,

vs.

Rentar Industrial Development Corp., et al.,

Appellants,

et al.,

Defendants.

The appellant(s) in the above entitled appeal appeared by Tenzer, Greenblatt Fallon & Kaplan; the respondent(s) appeared by McGarrahan & Heard.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, on the opinion by then Presiding Justice Frank A. Gulotta. In addition, it is observed that the dissenting opinion at the Appellate Division confuses the impact of a lien on property which does not dispossess the owner with the line of cases in the Supreme Court of the United States involving precisely such dispossession by seizure without preliminary judicial determination. Question certified answered in the affirmative. All concur except Fuchsberg, J., who dissents and votes to reverse in the following memorandum: For the reasons set forth in the dissenting opinion of Mr. Justice J. Irwin Shapiro at the Appellate Division, I believe that New York State's mechanics' lien law

Appendix A, Order and Judgment of Affirmance.

(Lien Law, § 3 *et seq.*), in the form in which it presently seeks to protect lienors, unecessarily and unconstitutionally deprives lienees of valuable property rights without due process of law. I would, therefore, vote to reverse and grant the motion for partial summary judgment.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, March 21, 1978.

Appendix B, Notice of Appeal to the Supreme Court of the United States

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Index No. 6455/75

CARL A. MORSE, INC. (Diesel Construction, a division), individually and on behalf of trust beneficiaries of funds accruing for the construction of an improvement of real property at Tax Block 3605, Lot 1, Queens, New York,

Plaintiff-Appellee,

against

RENTAR INDUSTRIAL DEVELOPMENT CORP., RENTAR INDUSTRIAL DEVELOPMENT ASSOCIATES, VERTICAL INDUSTRIAL PARK ASSOCIATES, ARTHUR RATNER, DENNIS RATNER and MARVIN RATNER,

Defendants-Appellants,

and

THE CITY OF NEW YORK, ET AL.,

Defendants.

SIRS:

PLEASE TAKE NOTICE that the defendants Rentar Industrial Development Corp., Rentar Industrial Development Associates, Vertical Industrial Park Associates, Arthur Ratner, Dennis Ratner and Marvin Ratner appeal to the Supreme Court of the United States of America from the order and judgment of the Court of Appeals, State of New York, dated March 21, 1978, affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated January 24, 1977, which

Appendix B, Notice of Appeal to the Supreme Court of the United States.

affirmed the order of the Supreme Court, Queens County, dated February 6, 1976, denying their motion for partial summary judgment.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: June 9, 1978
New York, N.Y.

TENZER, GREENBLATT, FALLON & KAPLAN
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To: Clerk of Queens County

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Attorney General of the State
of New York *Pro Se*
Two World Trade Center
New York, N. Y. 10047

[Affidavit of Service omitted in printing]

[The Notice of Appeal was filed in the Office of the Clerk of Queens County on June 13, 1978]

Appendix C

ARTICLE 2

MECHANICS' LIENS[1]

§ 3. Mechanic's lien on real property

A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife contracting shall also be presumed to be the agent of the other, unless such other having knowledge of the improvement shall, within ten days after learning of the contract give the contractor written notice of his or her refusal to consent to the improvement. Within the meaning of the provisions of this chapter, materials actually manufactured for but not delivered to the real property, shall also be deemed to be materials furnished. L.1909, c. 38; amended L.1929, c. 515, § 2; L.1930, c. 859, § 4; L.1941, c. 477, eff. June 1, 1941.

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[1] Only certain sections of the Lien Law which relate to liens for private improvements are involved in this appeal and are reproduced in this Appendix.

§ 4. Extent of lien

(1) [1] Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired, except as hereinafter in this article provided. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided. L.1909, c. 38; amended L.1916, c. 507, § 2; L.1929, c. 515, § 2; L.1930, c. 859, § 5, eff. Oct. 1, 1930.

§ 9. Contents of notice of lien

The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners

[1] So in original. There is no subd. (2).

and principal place of business, and if a foreign corporation, its principal place of business within the state.

1-a. The name and address of the lienor's attorney, if any.

2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.

4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. L.1909, c. 38; amended L. 1916, c. 507, § 4; L.1929, c. 515, § 2; L.1966, c. 42, § 1, eff. Jan. 1, 1967.

§ 10. Filing of notice of lien

Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished. The notice of lien must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the "lien docket," which shall be suitably ruled in columns headed "owners," "lienors," "lienor's attorney," "property," "amount," "time of filing," "proceedings had," in each of which he shall enter the particulars of the notice, properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. Except where the county clerk maintains a block index, the names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed.

Where the county clerk indexes liens in a block index, every notice of lien presented to the clerk of a county of filing, in order to entitle the same to be filed, shall contain in the body thereof, or shall have endorsed thereon, a designation of the number of every block, on the land map of the county, which is affected by the notice of lien. The county clerk shall cause such notice of lien to be entered in the block index suitably ruled to contain the columns listed in the preceding paragraph, under the block number of every block so designated. In cases where a notice of lien shall have been filed without such designa-

tion or with an erroneous designation, the county clerk, on presentation of proper proof thereof, shall enter such instrument in the proper index, under the proper block number of every block in which the land affected is situated, and shall, at the same time, make a note of such entry and of the date thereof in every place in which such instrument may have been erroneously indexed, opposite the entry thereof, and also upon the instrument itself, if the same be in his possession or produced to him for the purpose, and the filing of such instrument shall be constructive notice as to property in the block not duly designated at the time of such filing only from the time when the same shall be properly indexed. L.1909, c. 38; amended L.1916, c. 507, § 5; L.1929, c. 515, § 2; L.1956,

§ 11. Service of copy of notice of lien

At any time after filing the notice of lien, the lienor may serve a copy of such notice upon the owner, if a natural person, by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or by registered letter addressed to his last known place of residence, or, if such owner has no such residence in such city or town or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon; if the owner be a corporation, said service shall be made by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or c. 793, § 3; L.1966, c. 42, § 2, eff. Jan. 1, 1967.

if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or by registered letter addressed to its last known place of business. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of such lien. L.1909, c. 38; amended L.1913, c. 88; L.1929, c. 515, § 2, eff. Oct. 1, 1929.

§ 12-a. Amendment

1. Within sixty days after the original filing, a lienor may amend his lien upon twenty days notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanics' lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of a wilful exaggeration shall survive such amendment.

2. In a proper case, the court may, upon five days' notice to existing lienors, mortgagees and owner, make an order amending a notice of lien upon a public or private improvement, nunc pro tunc. However, no amendment shall be granted to the prejudice of an existing lienor, mortgagee or purchaser in good faith, as the case may be.

As amended L.1971, c. 1048, eff. July 2, 1971.

§ 17. Duration of lien

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action,

whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an order be granted within one year from the filing of such notice by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be re-docketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency of action shall not be filed.

A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules. As amended L.1970, c. 696, eff. May 12, 1970.

§ 19. Discharge of lien for private improvement

A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:

(1) By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating that the lien is satisfied or released as to the whole or a portion of the real property affected thereby and may be discharged in whole or in part, specifying the part. Upon filing such certificate, the county clerk in the office where the same is filed, shall note the fact of such filing in the "lien docket" in the column headed "Proceedings had" opposite the docket of such lien.

(2) By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien, unless an action be begun within the same period to foreclose a mortgage or another mechanic's lien upon the same property or any part thereof and a notice of pendency of such action is filed according to law, but a lien, the duration of which has been extended by the filing of a notice of the pendency of an action as herein provided, shall nevertheless terminate as a lien after such notice has been canceled or has ceased to be effective as constructive notice.

(3) By order of the court vacating or cancelling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to section fifty-nine of this chapter.

(4) Either before or after the beginning of an action by the owner or contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the clerk of the county where the premises are situated, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien con-

ditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made by such court, judge or justice discharging such lien. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties; and where a certificate of qualification has been issued by the superintendent of insurance under the provisions of section three hundred and twenty-seven of the insurance law, and has not been revoked, no justification or notice thereof shall be necessary, and in such case a copy of the undertaking and notice of the application for an order to discharge the lien must be served upon the lienor or his attorney not less than two days before such application for such order is made. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. If the lienor cannot be found, or does not appear by attorney, such service may be made by leaving a copy of said undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within the state as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien

and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person serving the papers or directing the service had knowledge to the contrary.

(5) Upon the filing in the office of the clerk of the county where the property is situated, a transcript of a judgment of a court of competent jurisdiction, together with due proof of service of due notice of entry thereof, showing a final determination of the action in favor of the owner of the property against which the lien was claimed.

(6) Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. A copy of the papers upon which application will be made together with a notice setting forth the court or the justice thereof or the judge to whom the application will be made at a time and place therein mentioned must be served upon the lienor not less than five days before such time. If the lienor can not be found, such service may be made as the court, justice or judge may direct. The application must be made upon a verified petition accompanied by other written proof showing a proper case therefor, and upon the approval of the applica-

tion by the court, justice or judge, an order shall be made discharging the alleged lien of record. L.1909, c. 38; amended L.1909, c. 240, § 53; L.1909, c. 427; L.1916, c. 507, § 11; L.1920, c. 373; L.1929, c. 515, § 2; L.1930, c. 859, §§ 9-11; L.1941, c. 16, § 2; L.1957, c. 877, § 6; L.1958, cc. 116, 791; L.1962, c. 310, § 260, eff. Sept. 1, 1963.

§ 20. Discharge of lien after notice of lien filed by payment of money into court

A lien specified in this article, other than a lien for performing labor or furnishing materials for a public improvement, may be discharged after the notice of lien is filed at any time before an action is commenced to foreclose such lien, by depositing with the county clerk, in whose office the notice of lien is filed, a sum of money equal to the amount claimed in such notice, with interest to the time of such deposit. After such deposit is made and the lien is discharged the county treasurer or any other officer with whom the money is deposited shall, within ten days thereafter, send a notice by mail to the lienor, at the address given in the lien, that such lien has been discharged by deposit. After action to foreclose the lien is commenced it may be discharged by a payment into court of such sum of money, as, in the judgment of the court or a judge or justice thereof, after at least five days' notice to all the parties to the action, will be sufficient to pay any judgment which may be recovered in such action. Upon any such payment, the county clerk shall forthwith enter upon the lien docket and against the lien for the discharge of which such moneys were paid, the words "discharged by payment." A deposit of money made as prescribed in this section shall be repaid to the party making the deposit, or his successor, upon the discharge of the liens against the property pursuant to law. All deposits of money made as provided in this section shall be considered as paid into court and shall be subject to the provisions of law relative

to the payment of money into court and the surrender of such money by order of the court. An order for the surrender of such moneys to the lienor or depositor may be made by any court of record having jurisdiction of the parties. If no action is brought in a court of record to enforce such lien, such order may be made by any judge of a court of record. If application for such order is made by lienor it shall be on notice to the depositor; if made by the depositor then on notice to the lienor. L.1909, c. 38; amended L.1924, c. 556; L.1929, c. 515, § 2; L.1953, c. 645, eff. April 13, 1953.

§ 23. Construction of article

This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same. L.1909, c. 38; amended L.1929, c. 515, § 2, eff. Oct. 1, 1929.

§ 34. Waiver of lien

Notwithstanding the provisions of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable. This section shall not preclude a requirement for a written waiver of the right to file a mechanic's lien executed and delivered by a contractor, subcontractor, material supplier or laborer simultaneously with or after payment for the labor performed or the materials furnished has been made to such contractor, subcontractor, material man or laborer nor shall this section be applicable to a written agreement to subordinate, release or satisfy all or part of such a lien made after a notice of lien has been filed.

Added L.1975, c. 74, § 1; amended L.1977, c. 703, § 1.

§ 37. Bond to discharge all liens

(1) The owner or contractor between whom a contract exists for the improvement of real property may, either before or after the commencement of the improvement, execute as a principal, a bond to the county clerk of the county where the premises are situated in such amount as the supreme court of this state, or any justice thereof, or the county court or the county judge of such county may direct, which shall not be less than the amount then unpaid under such contract, conditioned for the payment of any judgment or judgments which may be recovered in any action brought for the enforcement of any and all claims, notices of which may be filed as in this section provided, arising by virtue of labor performed or materials furnished in or about the performance of any such contract. As many such bonds may be executed as there are contractors employed upon the improvement.

(2) Such a bond must be executed as a surety by a fidelity or surety company authorized to do business in this state, and to which a certificate of solvency has been issued and is unrevoked pursuant to section one hundred and nine-a of the insurance law.[1]

(3) Such bond shall recite the name of the owner, the name of the contractor, the name of the surety company, the date and amount of the contract, and shall contain a description of the real property upon which the improvement is to be made, is being made, or has been made; such description shall be sufficient if it complies with the requirements in respect thereto prescribed for a notice of lien.

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[1] Insurance Law of 1909 was repealed by Insurance Law of 1939, § 600, eff. Jan. 1, 1940. Provisions on the subject of section 109-a of the former law are now contained in Insurance Law of 1939, § 327.

(4) Upon the approval of any such bond by such court, judge or justice thereof and upon the filing of such bond with the county clerk of the county where the real property is situated, an order shall be made by such court, judge or justice discharging such property from the lien of each and every contractor, subcontractor, material man or laborer performing labor or furnishing materials in or about the performance of the contract described in such bond. After the filing of such bond, the owner and the contractor named therein shall no longer be obligated to comply with the provisions of section eight of this chapter insofar as said provisions may relate to or in any way affect the contract, described in said bond, or the rights of any person performing labor or furnishing materials in or about the performance thereof.

(5) A contractor, subcontracor, laborer or material man who performs labor or furnishes materials in or about the performance of the contract described in such bond shall have a claim, which shall attach against and be secured by such bond, for the principal and interest of the value, or the agreed price, of such labor and materials. Within the meaning of the provisions of this section, materials actually manufactured for but not delivered to the real property, shall also be deemed to be materials furnished.

The claimant in order to perfect his claim shall within the time prescribed in this chapter for the filing of a notice of lien, file a notice of claim in the office of the clerk of the county where such bond is filed. Any such claimant who has so perfected his claim may bring an action on the bond for the enforcement thereof in any court where an action might have been brought if such claim were a lien filed against such real property.

(6) The notice of claim shall state: (1) the name and residence of the claimant; and if the claimant is a partnership or a corporation, the business address of such firm, or

corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state; (2) the names of the owner, contractor and surety named in the bond; (3) the name of the person by whom the claimant was employed or to whom he furnished or is to furnish materials; (4) the labor performed or materials furnished, including also materials actually manufactured for but not delivered to the real property, and the agreed price or value thereof; (5) the amount unpaid to the claimant for such labor or materials; (6) a description of the real property such as is required for a notice of lien.

The notice of claim shall be verified by the claimant or his agent in the form required for the verification of notices in section nine of this chapter.

(7) The plaintiff in such an action must, prior to the commencement thereof, file in the office of the clerk of the county where the bond is filed, the summons and complaint in such action and shall join as parties defendant, the principal and surety on the bond, the contractor, and all claimants who have filed notices of claim prior to the date of the filing of such summons and complaint. In case a claimant files his notice of claim on or after the date of such filing of such summons and complaint he may be brought in by amendment at any time up to and including the time and in the manner and under the conditions that a lienor may be brought into an action to foreclose a lien pursuant to section sixty-two of this chapter.

(8) The court may adjust and determine the equities of all the parties to the action and render an appropriate judgment. In case a counterclaim is set forth by any defendant, such defendant shall be deemed to have waived a trial by jury of the issues raised thereby.

(9) An action upon such a bond shall be begun within one year after the completion of the improvement, or if the

work thereon is abandoned, then within two years after the last item of work was performed or the last item of materials was furnished by the claimant. The beginning of the action by the plaintiff-claimant shall be deemed a bringing of the action by each defendant-claimant made a party thereto.

(10) The county clerk of each county shall provide and keep a book called the "lien bond docket," which shall be suitably ruled in columns headed "owner," "contractor," "claimant," "property," "surety," "amount of bond," "time of filing," "amount of claim," "proceedings had," in each of which he shall write the particulars of the notice of claim property[2] belonging therein. The date, hour and minute of the filing of notice of each claim and of the filing of the summons and complaint in any action commenced on said bond shall be entered in the proper column. The names of the owners shall be arranged in such book in alphabetical order. The validity of the claim and the right to file a notice thereof shall not be affected by the death of the principal before notice of the claim is filed.

(11) In the event that notwithstanding the provisions of this section a contractor, subcontractor, material man or laborer, whose lien has been discharged in the manner provided in this section, shall thereafter file a notice of lien against the real property, then upon application of the owner or contractor to the supreme court of this state or any justice thereof or the county court or the county judge of the county where such notice of lien is filed and upon proof that the bond approved and filed as in this section provided secures the payment of the claim set forth in any such notice of lien, the court, justice or judge thereof shall make an order discharging such lien. In any such case a

[2] So in original. Probably should read "properly."

copy of the bond and notice of the time and place of making such application for such order to discharge any such lien shall be served upon the lienor or his attorney not less than two days before such time.

(12) A claim which has been perfected by the filing of a notice of claim may be discharged as follows: (1) By the certificate of the claimant duly acknowledged or proved and filed in the office where the notice of claim is filed, stating that the claim is satisfied and may be discharged; (2) By failure to begin an action as and within the time provided in this section. Added L.1929, c. 515, § 2, eff. Oct. 1, 1929.

§ 38. Itemized statement may be required of lienor

A lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished. The statement shall be verified by the lienor or his agent in the form required for the verification of notices in section nine of this chapter. If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor, or if the lienor delivers an insufficient statement, the person aggrieved may petition the supreme court of this state or any justice thereof, or the county court of the county where the premises are situated, or the county judge of such county for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section. Two days' notice in writing of such application shall be served upon the lienor. Such service shall be made in the manner provided by law for the personal service of a summons. The

court or a justice or judge thereof shall hear the parties and upon being satisfied that the lienor has failed, neglected or refused to comply with the requirements of this section shall have an appropriate order directing such compliance. In case the lienor fails to comply with the order so made within the time specified, then upon five days' notice to the lienor, served in the manner provided by law for the personal service of a summons, the court or a justice or judge thereof may make an order canceling the lien. Added L.1929, c. 515, § 2; amended L.1930, c. 859, § 19, eff. Oct. 1, 1930.

§ 39. Lien wilfully exaggerated is void

In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice. Added L.1930, c. 859, § 20, eff. Oct. 1, 1930.

§ 39-a. Liability of lienor where lien has been declared void on account of wilful exaggeration

Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any

money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon. Added L.1930, c. 859, § 20, eff. Oct. 1, 1930.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1775

CARL A. MORSE, INC. (Diesel Construction, a division), individually and on behalf of trust beneficiaries of funds accruing for the construction of an improvement of real property at Tax Block 3605, Lot 1, Queens, New York,

Plaintiff-Appellee,

against

RENTAR INDUSTRIAL DEVELOPMENT CORP., RENTAR INDUSTRIAL DEVELOPMENT ASSOCIATES, VERTICAL INDUSTRIAL PARK ASSOCIATES, ARTHUR RATNER, DENNIS RATNER AND MARVIN RATNER,

Defendants-Appellants,

and

THE CITY OF NEW YORK, ROBERT HALL METROPLEX CENTER CORP., R. H. MACY & CO., INC., STONE SUPPLY CO., INC., BLACKMAN-SHAPIRO CO., INC., A TO Z EQUIPMENT CORP., GLOBE PIPE & FITTING CO., INC., ABCO INDUSTRIAL SUPPLY CORP., CARPENTER AND PATERSON OF NEW YORK, INC., NEILL SUPPLY CO., INC., BALTIMORE AIRCOOL COMPANY, a subsidiary of MERCK & COMPANY, INC., MATERIAL STRENGTH, INC., ALBERT SAGGESE, INC., RAC MECHANICAL, INC., SAL PICONE & SONS, INC., ALBERT PIPE SUPPLY CO., INC., MUNRO WATERPROOFING, INC., HANLEY COMPANY INCORPORATED, JOEL J. CHAIT PLUMBING & HEATING CORP., J. C. EXCAVATION CORP., TRIPLE M. ROOFING CORP., REUTHER MATERIAL CO., PETROLEUM FOR CONTRACTORS, INC., NATIONAL LIGHTING SUPPLY CO., INC., KELLEY COMPANY, INC., FLOCKHART FOUNDRY COMPANY, STYRO SALES COMPANY, INC., CONTRACTORS SUPPLY CORP., MASON MIX, INC., ADVANCED AIR CONTROL CORP., LIGHTING ASSOCIATES, INC., STANTON SAMSON CORP., WORTH SUPPLY CO., INC., ROBERT E. LEVIEN, PRINCE CARPENTRY, INC., LITEMORE ELECTRIC CO., INC. and SCHECTMAN CARPENTRY, INC., ARGONAUT INSURANCE COMPANY, BILLEN AIR CONDITIONING, INC. and REVO MECHANICAL INC.,

Defendants.

MOTION TO DISMISS OR AFFIRM

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Defendants.

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein on the ground that it does not present a substantial federal question or, in the alternative, to affirm the order of the New York Court of Appeals on the ground that the questions raised by the appeal are so unsubstantial as not to need further argument.

I

The Statute Involved

Appellants challenge the constitutionality of New York's Mechanics' Lien Law, which appears as Article 2 of the New York Lien Law (McKinney 1966). The applicable provisions of the Mechanics' Lien Law are set forth in Appendix C to Appellants' Jurisdictional Statement, with one exception: The version of Section 34 of the Lien Law set forth at page 16a of the Appendix is a recent amendment and is not applicable to this case. At the time this case arose, Section 34 provided as follows:

> "§34 Waiver of Lien
>
> A contractor, subcontractor, material man or laborer may not waive his lien, except by express agreement in writing specifically to that effect, signed by him or his agent."

II

Statement of the Case

Introduction

The Statement of the Case set forth in Appellants' Jurisdictional Statement does not accurately define the issues involved in this appeal. Appellants' constitutional argument turns on a number of unproved factual premises. The key issues of fact are very much in dispute, and, unless all are resolved in Appellants' favor, their constitutional argument must fail. The New York courts chose to reach the constitutional question, evidently concluding that, even if Appellants' factual premises are valid, the Mechanics' Lien Law is constitutional. Appellee argued in the New York courts and submits to this Court that on the record of this case the Mechanics' Lien Law may be upheld but may not be declared unconstitutional.

Statement of Facts

This case involves a contract dispute between the Appellants, who are owners and developers of real property, and the Appellee, who is a construction manager. The parties are all competent, experienced and sophisticated masters of their respective crafts.

On May 15, 1972, the parties entered into a written agreement pursuant to which Appellee agreed to manage and supervise the construction of a massive new "Vertical Industrial Park" in New York City for Appellants, the owners of the property, and to act as the Appellants' agent for certain purposes. Appellants agreed to pay Appellee a fee for performing these services and to reimburse Appellee for certain costs and expenses.

The Vertical Industrial Park was in fact built, and the building, a warehouse complex containing approximately

1,700,000 square feet of floor space, was occupied upon completion by Appellants' tenants. Appellants do not contend that the filing of the mechanic's liens interfered in any way with the completion of the building, with its use and occupancy by Appellants and their tenants, or with the payment by the tenants and collection by the Appellants of rents.

Appellee performed work under the contract and submitted regular requisitions for payment of its fees and reimbursements of its expenses. Appellants made their payments to Appellee under the contract on a more-or-less regular basis until September 19, 1974. After that date Appellants refused to honor Appellee's requests for payment of fees and reimbursements in the amount of $1,009,983.66. In November, 1974, Appellee filed four notices of mechanic's liens totalling $1,003,983.66 pursuant to §10 of the Mechanics' Lien Law.

On December 19, 1974, Appellants made a written demand on Appellee pursuant to Lien Law §38 for a verified itemized statement specifying the basis of its liens. Appellee delivered its verified statement, consisting of more than 500 pages, on April 9, 1975.

Pursuant to Lien Law §19, on August 8, 1975, Appellants discharged the liens by posting a bond in the amount of $1,171,000.00.

Following the discharge of the liens, Appellants obtained a permanent mortgage loan from the Bowery Savings Bank, pursuant to a pre-existing commitment, in the amount of $38,700,000. This loan refinanced Appellants' construction loan from Manufacturers Hanover Trust Company. Appellants concede that the Bowery loan was obtained at an interest rate of 8.25% at a time when market interest rates were at least 9%. Appellants themselves characterize these

as "extremely favorable terms", and acknowledge that they saved many hundreds of thousands of dollars in additional interest that would have been charged on the prevailing market by any other lender.

The essence of Appellants' constitutional claim is that the filing of the notices of lien "almost" destroyed their ability to obtain the mortgage loan from Bowery. Appellee disputes this and points out that the most Appellants have actually alleged is that they had some difficulty in obtaining the loan at a below market interest rate. Appellants attribute this difficulty to a requirement that the Bowery loan be a first lien on the property. Appellee disputes this conclusion, because, as a matter of New York law, both the Manufacturers Hanover construction loan and the Bowery refinancing loan were senior to Appellee's mechanic's liens, or at least would be senior if the banks themselves had managed the loans properly.

Significantly, Appellants do not allege that they would have been unable to obtain permanent mortgage financing at a market interest rate and on normal terms from the Bowery or another lender. Indeed, it is clear from the Statement of the Case that Appellants have not been damaged at all: at a cost of $17,210 per year, plus some legal fees, they have managed to mortgage the property on "extremely favorable terms" and to enjoy the use of more than $1 million of Appellee's money for nearly four years.

At the time the agreement between the parties was entered into, a contractor, laborer or materialman could waive his right to file mechanic's liens under the then-existing version of §34.* Although Appellants were suc-

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* The amendment to §34 set forth in Appellants' Appendix C was not retroactive; and thus any waiver obtained by Appellants would still be valid, *Garber Building Supplies, Inc.* v. *Community National Bank and Trust Co. of New York*, —— A.D. 2d ——,

cessful in obtaining such waivers from other contractors on the Vertical Industrial Park, they did not obtain a waiver from the Appellee. Appellee asserts that Appellants knew full well when the contract was signed that Appellee would have recourse to the Mechanics' Lien Law in any dispute over payment and that the right to such recourse was part of the bargained-for consideration of the contract. Appellants dispute this and argue that Appellee's agreement to act as an agent for some purposes precludes it from resorting to mechanic's liens.

The Proceedings to Date

Appellee's notices of mechanic's liens were filed in November, 1974. In December, 1974, Appellants commenced an action against Appellee for breach of contract, seeking damages of approximately $6 million. On April 2, 1975, Appellee commenced this action for foreclosure of its mechanic's liens. This lien foreclosure action and Appellants' breach of contract action will be tried jointly.

On August 15, 1975, after answering the complaint in the lien foreclosure action and serving a counterclaim, Appellants moved for partial summary judgment dismissing Appellee's mechanic's liens on the ground that the procedures of the Mechanics' Lien Law, *as applied to the "unique factual situation" of this case,* resulted in a deprivation of Appellants' property by state action without due process of law in violation of the 14th Amendment to the Constitution of the United States.*

400 N.Y.S. 2d 845 (2d Dep't 1977); ***Michael Duff, Inc.*** v. ***Fair Housing Development Fund Corporation, et al.***, 56 A.D. 2d 575, 391 N.Y.S. 2d 451 (2d Dep't 1977); ***Rotodyne, Inc.*** v. ***Consolidated Edison Co. of N.Y.***, 55 A.D. 2d 600, 389 N.Y.S. 2d 387 (2d Dep't 1976).

* Appellants also based their motion for partial summary judgment on the ground that Appellee, by agreeing to act as Appellants' agent for certain purposes, disqualified itself from filing notices of mechanic's liens. The New York Courts held that Appellee's agreement to serve as an agent for certain purposes did not amount, as a matter of law, to a surrender of its right to file notices of mechanic's liens, but that a triable issue of fact existed as to whether or not its services as agent are lienable within the meaning of the Lien Law.

Appellants' motion for partial summary judgment was denied by the Supreme Court. This denial was affirmed by the Appellate Division of the Supreme Court, Second Department, and the Court of Appeals affirmed the Second Department's order. Appellants are now before this Court on appeal.

III

The Questions Involved

This appeal presents three questions of law for review:

1. Are there disputed issues of fact in this case that preclude a decision by this Court on the constitutional questions raised by the Appellants?

2. Did the filing by Appellee of the notices of mechanic's liens deprive Appellants of their property by state action within the meaning of the 14th Amendment?

3. If the filing by Appellee of its mechanic's liens was state action that deprived Appellants of their property within the meaning of the 14th Amendment, was such deprivation effected without due process of law?

IV
ARGUMENT

A. Introduction

The filing of a notice of mechanic's lien does not affect the owner's possession or use of the property, nor does it impose any legal restriction on the sale, mortgaging or other disposition of the property. It serves merely to put third persons on notice of the existence of the lienor's claim. Under §3 of the Mechanics' Lien Law, only a person who has improved real property ". . . at the request or with the consent of the owner . . ." is entitled to file a notice of lien, and the amount of the lien is limited to ". . . the value, or the agreed price . . ." of the lienor's work.*

The substance of the Appellants' argument to the Court is that New York's statutory recognition of the mechanic's lien and the procedures that New York provides for giving notice of this lien to third persons through the recording system amounted, on the facts of this case, to a deprivation of the Appellants' property without due process of law. For the reasons that will be explained below, this argument is particularly inappropriate in this case, and the questions raised by the Appellants are without substance.

B. The Order of the New York Court of Appeals Should Be Affirmed Because the Record of the Case Cannot Support a Conclusion That New York's Mechanics' Liens Law Is Unconstitutional

The New York courts have not resolved the factual issues upon which Appellants' claim of unconstitutionality turns. A question of fact exists in this case as to whether the final bargain struck between the parties contemplated

* The full text of §3 appears at p. 5a of Appendix C to Appellants' Jurisdictional Statement.

resort by Appellee to the mechanic's lien remedy in the event of a dispute over payment. Appellee argues that the contract contemplated that it would have recourse to mechanic's liens in any payment dispute. Appellants argue that Appellee, because it agreed to act as their agent, was not to have recourse to mechanic's liens. Therefore, even if this Court has reservations as to the constitutionality of the Mechanics' Lien Law, the record of the case does not support an invalidation of the Appellee's mechanic's liens; because if it is established at a trial that Appellee performed lienable services and that the parties bargained for a relationship that contemplated recourse to mechanic's liens, the matter would be governed squarely by *D. H. Overmyer Co., Inc.* v. *Frick Co.*, 405 U.S. 174 (1972).

The other factual issue on which Appellants' constitutional argument turns is whether or not the filing of the notices of lien was, in fact, the cause of Appellants' alleged difficulties in closing a mortgage loan with Bowery Savings Bank. The Bowery loan was a refinancing of a Manufacturers Hanover Trust Company construction loan and under New York law was senior to the Appellee's mechanic's liens or could have been made so. It is unlikely, therefore, that the mere fact of the filing of the notices of lien was a genuine obstacle to Bowery's making the loan. It is more likely that Bowery was attempting to avoid its pre-existing commitment to lend money at 8.25% at a time when prevailing interest rates had risen to at least 9%.

The New York Court of Appeals did not address these issues of fact, but rejected Appellants' constitutional arguments on their merits. While the record of the case supports this action, it would nct be possible on the same record to deprive Appellee of its liens; because Appellants have not been put to their proof, and it cannot be determined at this stage of the proceedings if there is any fac-

tual basis for their constitutional claims. Therefore the order of the New York Court of Appeals denying Appellants' motion for partial summary judgment should be affirmed, *Cedar Rapids Gas Light Co.* v. *City of Cedar Rapids,* 223 U.S. 655 (1912).*

C. The Questions Raised by the Appellant Have Already Been Decided by This Court

In *Spielman-Fond, Inc.* v. *Hanson's, Inc.,* 417 U.S. 901 (1974), the Court summarily affirmed a decision of a three judge District Court upholding the validity of Arizona's Mechanics' Lien Law. Arizona's Mechanics' Lien Law does not differ in any constitutional sense from the New York Mechanics' Lien Law. The Court's summary affirmance of the District Court's holding that the filing of a mechanic's lien under Arizona law does not amount to a taking of a significant property interest disposes of this case as well. Indeed, the case at bar is even more compelling. In *Spielman-Fond,* the plaintiffs at least alleged that they were unable to alienate their property freely. Here Appellants concede that they were able to mortgage theirs and allege only that the notices of lien "almost" prevented them from closing a mortgage loan at a below-market interest rate.

Appellants have not alleged that they are unable to use their property or that they are unable to earn a fair return on their investment. Clearly, a public purpose is served by the Mechanics' Lien Law. See *Cook* v. *Carlson,* 364

* The existence of these unresolved issues of fact raises the possibility that the order of the New York Court of Appeals from which this appeal is taken is not a "final judgment or determination" of that Court within the meaning of 28 U.S.C. §1257(2). See *Department of Banking of Nebraska* v. *Pink,* 317 U.S. 264 (1942), *rehearing denied* 318 U.S. 802 (1944); *Gospel Army* v. *City of Los Angeles,* 331 U.S. 543 (1946).

F. Supp. 24 (D.S.Dak. 1973). Therefore, even if the filing of the notices of mechanic's liens has affected the value that a purchaser or mortgagee would give for the property, such filing was not a "taking" of constitutional proportions. See *Penn Central Transportation Company, et al.* v. *City of New York,* 46 U.S.L.W. 4856 (1978).

The filing of the notices of lien in this case involved a far lesser interference with the Appellants' property than the dispossessions involved in *Flagg Brothers, Inc.* v. *Brooks, et al.,* 46 U.S.L.W. 4438 (1978), *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601 (1975); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) and *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969). All that has happened so far in this case is that notices of lien have been filed. The New York courts will supervise the ultimate resolution of the issues and the ultimate disposition of Appellants' property. See also *Sharrock* v. *Dell Buick-Cadillac, Inc.,* —— N.Y. 2d —— (1978) decided by the New York Court of Appeals on July 11, 1978 (Number 421) where the Court held that a garageman's lien may be imposed without judicial supervision but that judicial supervision is required for its enforcement.

The Court in *Flagg Brothers* observed that the bailor had not alleged that she was prevented by law from obtaining a waiver by the bailee of its right to enforce the warehouseman's lien. In the case at bar, it is clear that the Appellants were not precluded from seeking such a waiver; it is equally clear that they did not get one from the Appellee although they were successful in obtaining waivers under former §34 from other contractors on the project. *Cf.: D.H. Overmyer Co., Inc.* v. *Frick Co., supra.*

D. Even if the Filing of a Notice of Lien Under the New York Mechanics' Lien Law is a Taking of Property by State Action, the Procedures Under the Law Afford the Property Owner Due Process of Law

Even if Appellee's giving of notice to third persons of the existence of its claim by filing notices of mechanic's liens is viewed as a taking of property, the procedures under the Lien Law fully satisfy the constitutional requirement of due process.

Once a notice of lien has been filed, the Lien Law affords a property owner a variety of procedures for seeking immediate judicial review of the lien, which he can invoke if the lien is invalid on its face, exaggerated, based on a fraudulent claim or otherwise lacking in bona fides or substance.

Under Lien Law §19(6), an owner may commence a summary proceeding for the discharge of a lien if it "appears from the face of the notice" that the lien is invalid, if the notice does not contain information required by §9 or if it was not filed in accordance with §10.

Under Lien Law §38, an owner may require a lienor to submit a written itemized statement setting forth the nature of the labor and materials furnished on which the lien is based and the terms of the contract under which the work was done. Armed with such a statement, the owner may seek discharge of the lien in a summary proceeding under §19(6). The statement will be considered as the lienor's "bill of particulars" in determining whether or not the notice, including the verified statement, is sufficient on its face. *Application of J.D.H. Builders, Inc.*, 155 N.Y.S.2d 121 (Sup. Ct., Nassau County 1956); *Application of Jory Construction Corp.*, 158 N.Y.S. 2d 632 (Sup. Ct., Westchester County 1956).

If the owner believes that the lien has been exaggerated, he may raise this issue in a trial on the merits of the underlying action or "in any action or proceeding . . . in which the validity of the lien is in issue. . ." (Lien Law §39) including a summary proceeding under §19(6).

Shortly after the filing of the liens, Appellants requested, and Appellee duly delivered, a verified statement pursuant to §38. Appellants did not, however, exercise their right to seek an immediate judicial hearing to determine whether or not the notice, including the verified statement, made out a prima facie case for the validity of Appellee's lien, or to determine whether or not the lien had been exaggerated. Instead, justifiably fearful of the outcome of such a hearing, Appellants attempted to avoid a searching factual inquiry by challenging the constitutionality of the Mechanics' Lien Law in a motion for summary judgment.

V

CONCLUSION

Wherefore, Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the New York Court of Appeals.

Respectfully submitted,

July, 1978

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Appellants,

against

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Appellees.

MOTION OF ATTORNEY GENERAL TO DISMISS OR AFFIRM

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Appellees.

MOTION OF ATTORNEY GENERAL TO DISMISS OR AFFIRM

Louis J. Lefkowitz, Attorney General of the State of New York, appearing herein below, pursuant to New York Executive Law § 71 in support of constitutionality, moves pursuant to Rule 16 of the Revised Rules of this Court that this appeal be dismissed for want of a substantial federal question, or that the judgment below be affirmed.

Opinions Below

The opinion of the Court of Appeals of the State of New York is at 43 N Y 2d 952, 375 N.E. 2d 409, 404 N.Y.S. 2d 343, and is reproduced as Appendix A of Appellants' Juris-

dictional Statement. The opinion of the Appellate Division of the Supreme Court is at 56 A D 2d 30, 391 N.Y.S. 2d 424. The opinion of Special Term, Supreme Court, Queens County is at 85 Misc 2d 304, 379 N.Y.S. 2d 994.

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2).

Statute Involved

New York Lien Law, Art. 2 (§§ 3, 4, 9, 10, 11, 12-a, 17, 19, 20, 23, 34, 37, 38, 39 and 39-a) which is set forth at Appendix C of the Jurisdictional Statement.

Question Presented

Does the Court of Appeals' conclusion that the New York mechanics lien is constitutional raise a substantial federal question?

Facts and Prior Proceedings

Appellee Carl A. Morse, Inc. served a summons and complaint seeking to enforce its mechanics liens filed on appellants' Rentar property. These liens were filed in the Supreme Court, Queens County, after Rentar and Morse entered into a contract for Morse to build a building as "contractor" and "agent". Thus Morse filed the liens in excess of $1,000,000 for work, labor and services rendered. When a payment dispute arose, Morse started the instant action. At Special Term, Rentar moved for summary judgment on two grounds (1) Morse did not have a valid lien as it was an agent and (2) the Lien Law was unconstitutional. As to the constitutional issue, Special Term rejected same, and as to the non-constitutional issue, "agent" status, found a triable issue of fact.

The Appellate Division was in "complete agreement" and affirmed (391 N.Y.S. 2d at 426). There was a dissent. On motion, it granted leave to appeal (March 14, 1977). The Court of Appeals affirmed on the opinion of the Appellate Division (J.S. 1a).

ARGUMENT

No substantial federal question is present on this appeal as the mechanic's lien does not deprive one of possession of property and due process does not require a prior hearing.

There can be little doubt that the mere filing of a mechanic's lien does not deprive the owner of real estate property without due process of law. While, as the Appellate Division said, 391 N.Y.S. 2d at 429, and affirmed by the Court of Appeals, the lien may create a "cloud" on title, "the fact remains that the owner is not legally prevented from selling, encumbering, renting or otherwise dealing with the property as he chooses . . ." Thus, we submit, that no substantial federal question exists here. A prior hearing is not required. This Court did not find one herein when it affirmed *Speilman-Fond, Inc.* v. *Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), aff. 417 U.S. 901. Filing of a mechanic's lien does not result in the deprivation of any "significant property interest". This has been the uniform finding and result in the federal courts. See *Ruocco* v. *Brinker*, 380 F. Supp. 432, 436 (D.C. Fla. 1974, three-judge court); *Cook* v. *Carlson*, 364 F. Supp. 24 (D. S.D. 1973); and *Brook Hollow Assoc.* v. *J.E. Greene, Inc.*, 389 F. Supp. 1322 (D. Conn. 1975).*

Clearly, mechanic's lien serve a valuable function—(1) provide construction contractors with security and (2)

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* There are contrary sister state court decisions, but they are not relevant as the laws are different in wording.

gives notice to subsequent purchasers of a charge on the property. As the Court of Appeals noted (J.S. 1a) one must not confuse "a lien on property which does not dispossess with the cases in this Court involving dispossesion by seizure."

Of course even here we have a contract between knowledgeable businessmen and *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972) should bar any due process claim. In addition, there is doubtful "state action", a requisite of a due process claim. No government official is involved as to the lien. See *Flagg Brothers, Inc.* v. *Brooks*, —— U.S. ——, 56 L. Ed. 2d 185, 194 (1978).

CONCLUSION

The motion to dismiss or affirm should be granted.

Dated: New York, New York
July 17, 1978

Respectfully submitted,

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Attorney General of the
State of New York
Appellee Pro Se pursuant to
Executive Law § 71

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

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of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 17-1775

CARL A. MORSE, INC. (Diesel Construction, a division), individually and on behalf of trust beneficiaries of funds accruing for the construction of an improvement of real property at Tax Block 3605, Lot 1, Queens, New York,

Plaintiff-Appellee,

against

RENTAR INDUSTRIAL DEVELOPMENT CORP., RENTAR INDUSTRIAL DEVELOPMENT ASSOCIATES, VERTICAL INDUSTRIAL PARK ASSOCIATES, ARTHUR RATNER, DENNIS RATNER AND MARVIN RATNER,

Defendants-Appellants,

and

THE CITY OF NEW YORK, ROBERT HALL METROPLEX CENTER CORP., R. H. MACY & CO., INC., STONE SUPPLY CO., INC., BLACKMAN-SHAPIRO CO., INC., A TO Z EQUIPMENT CORP., GLOBE PIPE & FITTING CO., INC., ABCO INDUSTRIAL SUPPLY CORP., CARPENTER AND PATERSON OF NEW YORK, INC., NEILL SUPPLY CO., INC., BALTIMORE AIRCOOL COMPANY, a subsidiary of MERCK & COMPANY, INC., MATERIAL STRENGTH, INC., ALBERT SAGGESE, INC., RAC MECHANICAL, INC., SAL PICONE & SONS, INC., ALBERT PIPE SUPPLY CO., INC., MUNRO WATERPROOFING, INC., HANLEY COMPANY INCORPORATED, JOEL J. CHAIT PLUMBING & HEATING CORP., J. C. EXCAVATION CORP., TRIPLE M. ROOFING CORP., REUTHER MATERIAL CO., PETROLEUM FOR CONTRACTORS, INC., NATIONAL LIGHTING SUPPLY CO., INC., KELLEY COMPANY, INC., FLOCKHART FOUNDRY COMPANY, STYRO SALES COMPANY, INC., CONTRACTORS SUPPLY CORP., MASON MIX, INC., ADVANCED AIR CONTROL CORP., LIGHTING ASSOCIATES, INC., STANTON SAMSON CORP., WORTH SUPPLY CO., INC., ROBERT E. LEVIEN, PRINCE CARPENTRY, INC., LITEMORE ELECTRIC CO., INC. and SCHECTMAN CARPENTRY, INC., ARGONAUT INSURANCE COMPANY, BILLEN AIR CONDITIONING, INC. and REVO MECHANICAL INC.,

Defendants.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Defendants.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellants Rentar Industrial Development Corp., Rentar Industrial Development Associates, Vertical Industrial Park Associates, Arthur Ratner, Dennis Ratner and Marvin

Ratner submit this brief in response to appellee's motion to dismiss this appeal or, in the alternative, to affirm the order of the New York Court of Appeals ["Motion"].

ARGUMENT

A. No issues of fact preclude a determination by this Court that the New York Lien Law is unconstitutional

The courts below found appellants' constitutional claim ripe for decision. The so-called "issues of fact" were not relevant in the courts below nor are they relevant to the issues before this Court. Motion, pp. 8-10.

First, if, as appellants contend, the filing of a mechanic's lien effects a deprivation of property within the meaning of the Fourteenth Amendment, then proof of actual damages suffered by appellants is not necessary. See Appellants' Jurisdictional Statement on Appeal From the Court of Appeals, State of New York ["Jurisdictional Statement"], pp. 12-15.

In addition, proof of a desire by the Bowery Savings Bank to avoid its mortgage commitment to appellants would not show that apellants have not been damaged. In today's construction industry, no mortgagor will close its loan with substantial liens outstanding against the property. *See,* Jurisdictional Statement, p. 14. In this case, appellee filed over one million dollars worth of liens against appellants' property, and those liens were exaggerated by about $450,000. Appellee nowhere denies that its liens were exaggerated.

Neither would any trial on the merits ever result in a finding that this case is governed by *D. H. Overmyer Co. Inc.* v. *Frick Co.,* 405 U.S. 174 (1972). The fundamental and dispositive difference between this case and *Overmyer* is that, in the latter case, the parties had agreed in writing to the objectional procedures. 405 U.S. at 187. Here,

there was a writing, a completely integrated agreement, which makes no reference to appellee's right to file a lien.

Overmyer cannot be construed to require examination into parties' negotiations. Indeed, waiver must be apparent from the face of the parties' agreement:

> For a waiver of constitutional rights in any context must, at the very *least,* be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver. *Fuentes* v. *Shevin,* 407 U.S. 67, 95 (1975).

See also, *Garner* v. *Tri-State Development Company,* 382 F. Supp. 377, 381 (E.D. Mich., S.D. 1974).

There is no voluntary, intelligent and knowing waiver of rights apparent on the face of the agreement between appellants and appellee, as appellee concedes. *See Overmyer,* 405 U.S. at 187; Motion, p. 9. Indeed, Article 12 of the agreement provides that "all claims" and "disputes" between the parties were "to be submitted and determined pursuant to the New York Simplified Procedure for Court Determination of Disputes in the Supreme Court of the State of New York, First Judicial District". This article makes clear that the parties never contemplated either recourse to mechanics' liens or a waiver of constitutional rights.

In addition, even if the parties had agreed that appellee could file a lien, it cannot be suggested that the parties intended that appellee could file false and exaggerated liens.

Finally, as the court in *Overmyer* made clear, the agreed upon procedures were not unconstitutional *per se.* 405 U.S. at 187-188. Here, the procedures of the Lien Law are unconstitutional *per se* because they failed to give appellants (and every aggrieved owner) an early judicial hearing.

In light of the above, appellee's contention that this appeal is not a "final judgment or determination" within the meaning of 28 U.S.C. § 1257(2) is incorrect. This case comes squarely under the rubric of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481-486 (1975).

B. *Spielman-Fond* is not dispositive of this case

This Court's summary affirmance in *Spielman-Fond, Inc.* v. *Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd w/o opn.*, 417 U.S. 901 (1973), did not settle the issues raised by appellants in this case. See Jurisdictional Statement, pp. 11-12.

Appellee asserts that the Mechanic's Lien Laws of Arizona and New York are not different "in any constitutional sense". Motion, p. 10. However, the New York Lien Law lacks even the minimal due process protections contained in the Arizona Law.

Although the Arizona Law upheld in *Spielman-Fond* does not provide for notice or a prior hearing, it requires the lienor to serve a copy of the notice of lien upon the owner of the real property "within a reasonable time" after recording the lien. The notice of lien is also required to be made "under oath by the claimant or someone with knowledge of the facts". Ariz. Rev. Stat. Ann. § 33-993.

Under the New York law, after the notice of lien is recorded, "the lienor may serve a copy" of the notice of lien on the owner. However, no notice of filing is required to be given. Furthermore, the notice of lien need not be a sworn statement based on personal knowledge; it may be verified by the lienor or his agent on information and belief. Lien Law (McKinneys 1966) ["Lien Law"], §§ 9(7), 10, 11.

More significantly, the Arizona law requires a lienor to institute a suit to enforce his lien within six months of

filing. Ariz. Rev. Stat. Ann. § 33-998. As the Connecticut Supreme Court observed, "[s]uch a provision would seem to offer the bare minimum of due process protection consistent with the extent of deprivation present". *Roundhouse Const. Corp.* v. *Telesco Masons Supplies Co.*, 168 Conn. 371, 362, A.2d 778, 783 (1975), *reaffirmed*, 170 Conn. 155, 365, A.2d 393 (1975), *cert. den.* 429 U.S. 889 (1976).

Section 17 of the New York Lien Law, which is reproduced at pp. 10a-11a of appellants' Jurisdictional Statement, requires that the lienor commence an action to foreclose the lien within one year after the notice of lien has been filed. However, the lienor may obtain an order by a court of record within *one year* of filing the lien "continuing such lien" and, therefore, obviating the necessity of commencing an action to foreclose. "[A] new order and entry may be made in each successive year." Thus, in effect, under the New York Lien Law, a lienor may, for year after year, avoid judicial review of his lien or liens. No such extension procedure is provided for in the Arizona Mechanic's Lien Law.

Plenary consideration is required to determine whether the procedures of the New York Lien Law meet constitutional standards of due process.

C. No procedure was available to appellants whereby they could obtain immediate judicial review of appellee's liens

Appellee misleads this Court when it asserts that, under the Lien Law, appellants could have obtained a swift judicial determination as to whether appellee's liens were exaggerated. Motion, pp. 12-13.

Under New York law, the right to challenge a lien on the ground of exaggeration is always reserved for the trial of the foreclosure action. *Application of Upstate Builders Supply Co.*, 37 A.D. 2d 901 (4th Dep't. 1971), *app. dism'd.* 30 N.Y. 2d 515 (1972).

CONCLUSION

Appellee's motion should be denied in all respects. The decisions below warrant summary reversal. In any event, this Court should note probable jurisdiction and resolve the questions presented with briefs on the merits and oral argument.

July, 1978

Respectfully submitted,

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